United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

LEOLUCA GUARINO,

Defendant-Appellant.

On Appeal from Judgment of Conviction of the
United States District Court for the
Southern District of New York

BRIEF FOR APPELLANT GUARINO

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent,

-against-

LEOLUCA GUARINO,

Defendant-Appellant.

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ISSUES PRESENTED

1. Whether defendant, Guarino, had standing to suppress evidence seized from a suitcase checked at a railroad baggage terminal and whether the search of that suitcase was governmental action proscribed by the Fourth Amendment to the Constitution.

2. Whether the defendant made a sufficient initial showing to require a hearing to controvert an affidavit upon which an eavesdropping warrant was based.

3. Whether the continued listening to a party not named in an eavesdropping order violated the express terms of the order and the Fourth Amendment to the Constitution.

4. Whether an affidavit used to support the issuance of an eavesdropping order was sufficient to establish probable cause when that affidavit relied exclusively upon the opinion of the police officer who made it.

5. Whether a compendium of prosecutorial misdeeds at the trial taken together with the pre-trial and trial publicity, mandates a reversal herein.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the District Court for the Southern District of New York (Frankel, J.) dated January 3, 1973 wherein defendant, LEOLUCA GUARINO, was sentenced to an aggregate term of 18 years imprisonment. After trial by jury, the defendant was convicted of the five counts alleged in the indictment as follows:

Count I - Conspiracy to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

Counts II and III - Unlawfully, selling two kilograms of heroin in violation of Title 26, Sections 4705(a) and 7237(b), United States Code; Title 18, United States Code, Section 2.

Count IV - Unlawfully possessing with the intent to distribute and distribution of a Schedule I narcotic drug controlled substance, to wit, approximately five and one-half kilograms of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.

Count V - Unlawfully possessing with the intent to distribute and distribution of a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.

The Court sentenced the defendant on Counts I, II, III and V to fifteen years imprisonment, each term to run concurrently with the other and to a consecutive term of three years imprisonment on Count IV.

STATEMENT OF FACTS

On October 28, 1971, a warrantless search of a suitcase checked at the Toledo,Ohio Railroad Terminal resulted in the seizure of approximately five and one-half kilograms of heroin and one kilogram of cocaine. This evidence was introduced at the trial over defense objection and after motions to suppress by the defendants, Guarino, Della Cava and Capra, had been denied. (2239-2347) *.

The circumstances under which the suitcase was found were testified to prior to trial by Melton Julert, Charles Sibold, Albert Blevins and George Ryan.

On October 20, 1971, Melton Julert was working as "baggage agent" for the Penn Central Railroad at its terminal in Toledo, Ohio. At about 11:15 A.M., a man came to the baggage checkroom and checked a "black or charcoal gray suitcase." Julert made out the baggage check and collected 50 cents from the man who said "he would pick (the bag) up in a day or two." While Julert tried to persuade the stranger to check the valise in a key-locker elsewhere in the depot, the stranger insisted that the case be held in the baggage room itself.

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* Numerical references are to pages of the pre-trial and trial transcript filed herein which were consecutively numbered.

Later on, Julert picked up the valise and for a "fleeting" moment he supposed there might be a bomb in the bag and he "shook it back and forth". All he heard was some "rustling". (1334, 1336).

Julert was scheduled to be off on the following two days (until Saturday, October 23) and told his assistant, Charles Sibold that he had put the bag in the knee-hole part of his desk, just in case the owner came for it while he was away. When no one had come to claim the valise by the following Wednesday (October 27), he became worried that the bag would "come up missing". He discussed the matter with his assistant, Charles Sibold, and it was agreed that they should notify the Penn Central Police Department. (1336, 1337).

Julert stated that his main concern was that the bag was not being kept under truly secure conditions and could be lost - especially at night after he was gone. After he shook the valise initially, he did not believe it to contain explosives - but he was "curious" about its contents. He wanted the Railroad Police only to watch the bag - and he had not given any thought to opening it up. (1351-56, 1360-61, 1361, 1374).

Julert stated that, had the bag been lost, the Railroad's limit of liability would be $25.00. (1379).

Charles Sibold testified that, on October 20, 1971, the Toledo terminal baggage master, Melton Julert, drew his attention to a grip checked that day instructing him to charge 50 cents per day for storage. Julert was

in charge of the baggage room. On the following Saturday (October 23, 1971) the valise was still there and he "picked it up and shook it". The bag was heavy and its contents made a "swishing sound". (1434-36, 1446).

On Tuesday, October 26, 1971, the bag was still not claimed and Sibold suggested that they "contact the Penn Central police department captain, Al Blevins". Sibold had understood that the bag would be checked for only a day or two. He became "suspicious" of the bag in view of its weight which indicated to him that it had to contain something other than clothing. When Sibold was unable to speak to Captain Blevins that day, he vainly attempted to open the suitcase by himself. (1435-38).

On the following day, October 27, 1971, Sibold went to the Railroad police office and saw Captain Blevins, stating that he "wished to have the grip opened". He told Blevins he was "suspicious" of the bag. Then both he and Captain Blevins attempted to open the valise - without success. Blevins said he would try to get someone to open the case. On Thursday, October 28, Captain Blevins told Sibold that he had "some gentlemen coming down from the Toledo Police Department to try to open the case". (emphasis added.) * (1438-39, 1450, 1453).

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* On cross-examination, Sibold, at first, denied that he knew that more than one Toledo police officer would be coming to open the valise. (1466). He recanted that claim in the fact of his contradictory testimony at the Ohio suppression hearing. (1466-67).
Sibold also acknowledges, on cross-examination, that he knew the Toledo police were coming to "check" the bag - as opposed to merely aiding in opening it. (1464-65).

He also told Sibold that if the owner of the valise showed up before the city police got there, to get a physical description of the individual and to require him to sign the baggage check in order to secure a handwriting specimen. Sibold was further instructed by Blevins to "take" the license plate number of the man's automobile. (1455-56).

At 3:15 P.M. on October 28, Captain Blevins appeared with three Toledo policemen. In the rear of the baggage room, the "police officers started making attempts to open" the valise, using such items as a screwdriver, a pick, a key and paper clips. Blevins got the officers some paper clips to use as a device to open the satchel. The Toledo police officers finally managed to "unlatch" the grip - giving the same over to Sibold to actually open and spread the bag. In fact, after having sprung the locks, the Toledo officers "told" Sibold "to open" the suitcase. (1440-41, 1457, 1459-61, 1468-69, 1476).

On October 27, 1971, Albert Blevins was an Ohio State commissioned railroad policeman for the Penn Central Railroad at Toledo. (Blevins wears a badge stating on its face "State of Ohio" which also bears the Ohio State seal.) On that day, Charles Sibold told him about a suitcase that had been checked under suspicious circumstances. Sibold explained to him that the bag was supposed to have been picked up within two days of its being checked on October 20, 1971, but the "man" had not yet come for the satchel. Blevins said that Sibold was concerned that the bag "possibly could contain explosives".

Blevins "hefted" the valise and heard a "rustling" sound - like a

"plastic bag", and the case was heavy. Blevins agreed with Sibold that the circumstances were "suspicious" and to aid in the opening of the bag. The suitcase could not be opened, however, and Sibold asked Blevins to "get ... assistance in unlocking" the satchel. (At the Ohio suppression hearing, Blevins acknowledged that he had testified that both he and Sibold were unable to open the suitcase.) Blevins came up with a Samsonite key which did not work. He was "curious" about what was in the bag. He believed it had the makings of a bomb in it - based upon a similar experience in Cleveland. (1388-89, 1398, 1400).

Blevins then decided to call his "primary contact" in the Toledo Police Department (Detective George Ryan) for help. Ryan was the police officer of the City of Toledo he regularly called upon as his official police liaison. He described the problem to Detective Ryan who showed up the next day (October 28) with two other Toledo police officers (Beavers and Bedal). (1390-92, 1417).

While claiming that he had no idea at the time as to what the suitcase contained, Blevins acknowledged that both Detective Ryan and Detective Beavers were narcotics officers in the Metropolitan Drug Unit. Officer Bedal, with the help of clips supplied by Blevins, and other instruments brought by Bedal, managed to open the locks. Blevins acknowledged that, in his capacity as a "captain of the railroad police" he was "interested in what was inside the bag." He wanted to know what was in it - no matter whether it contained

makings of a bomb or something else. And he did aid Officer Bedal in opening the locks. (1333, 1343, 1351-53).

George Ryan, a Detective in the Toledo Police Department, often had contact with Captain Blevins of the Penn Central Railroad police in order to "facilitate his work and cut some of the red tape in connection with the (Toledo police) department." On October 27, 1971, Blevins telephoned him for help in opening a suitcase. Captain Blevins told him he suspected the valise contained bomb materials. Blevins said he wanted the bag opened for that reason. (1479-80, 1488-91).

Ryan tried to get some keys from the Toledo Police Department Property Clerk, but the keys had been thrown away. He was referred to another police officer - Bedal - who had some knowledge of opening locks. Detective Ryan saw Officer Bedal and made an appointment with him to go to the Railroad Terminal. (1480-81).

Ryan had also asked his superiors to supply him with a third policeman to assist at the Terminal and luckily he was able to enlist Detective Beavers (also a narcotics officer) for the task as both he and Bedal left police headquarters. He was going to the Terminal to "assist a fellow officer (Sgt. Blevins)". (emphasis added). (1481, 1486-87, 1491, 1500).

The three officers, (Ryan, Bedal and Beavers), met Captain Blevins at the Railroad Terminal and, along with Mr. Sibold, went to work on the suitcase in a rear area. One of the reasons the valise was moved before

opening it was that it might contain explosives. Officer Bedal worked with a screwdriver and a pick he had brought along with him. Paper clips were needed to work the locks - which Captain Blevins and Sibold provided. Detective Ryan helped Officer Bedal with a screwdriver while Bedal utilized a paper clip to breach the lock. (1482-83, 1493, 1505).

After Sibold threw open the suitcase, Detective Beavers reached down and picked up one of the plastic bags. Prior to the opening of the plastic bag, Ryan had no suspicion as to what was inside. The contents of the opened valise were still partially covered. Only after Detective Beavers had reached into the valise, had picked up one of the plastic bags and had opened the bag - which he then showed to Ryan - did Ryan suspect that drugs were involved. No action was taken at that point, or at any time thereafter, to procure a search warrant. (1484, 1497-99, 1507).

The defendant, Guarino, and his co-defendants, Capra and Della Cava, were required by the trial Court to give testimony with regard to their standing to suppress the evidence gained from the aforesaid search even though they had filed affidavits on September 5, 1973 alleging ownership in the suitcase on the date of the search. (See affidavits of Della Cava, Guarino and Capra).

Each defendant, therefore, took the stand and was cross-examined by the Government. (2-92). Their testimony established an agreement among them, (Guarino, Della Cava and Capra) and Joaquin Ramos.* The suitcase,

* An alleged co-conspirator, who testified for the Government at the trial but who did not testify for the Government at the pre-trial hearing on standing.

purchased by Della Cava from joint funds, was packed with narcotics by him and Capra and given over to Ramos whose responsibility it was to get the suitcase to Toledo where the drugs were to be removed by the purchaser, known to Ramos, and the balance of the money owed - some $38,000* - was to be put back in the suitcase and returned to the four partners (Ramos, Della Cava, Guarino and Capra). (91-2).

The Court denied the defendants motion to suppress stating:

> The evidence sufficiently at the suppression hearing and then beyond a reasonable doubt at the trial, showed that these movants, in the particular transaction and in many others, consistently demanded that the payment for their narcotics shipments be "up front", i.e., in advance of shipment and delivery ... the movants here had been paid in full for their contraband and had no further interest of any kind either in the wrapping - the suitcase - or the contents. (Slip op. at 5).

Another subject of pre-trial motions to suppress was the series of conversations intercepted by New York City Police between December 8, 1971 and February 3, 1972 pursuant to a New York County eavesdropping order dated December 8, 1971 and an order of extension thereof dated January 6, 1972. Seventeen conversations were played for the jury. (2170-2256).

Prior to trial, defendant, Guarino, had moved for suppression of

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* Although the defendants did not recall exactly how much was owed, the Government's proof at trial included Ramos' testimony that $38,000 was owed (437) and a handwritten note, (Exhibit 21), said by Ramos to have been written by Capra expressing the fact that $38,000 was owed, (433-41). Moreover, the Government argued on summation that $38,000 was owed (3862).

conversations intercepted pursuant to the eavesdropping order dated December 8, 1971 on the grounds (1) that the affidavit supporting the order was materially perjurious and (2) the conversations intercepted between December 8, 1971 and January 6, 1972 were not conversations of the party named in the order. It was also moved for suppression of the conversations intercepted between January 6, 1972 and February 3, 1972, pursuant to the order dated January 6, 1972 on the grounds that the order was based upon an affidavit insufficient on its face since (a) the conversations recited therein to establish probable cause were intercepted illegally between December 8, 1971 and January 6, 1972 and (b) assuming they were legally intercepted, they provided no basis in fact to establish probable cause but relied totally upon the opinion of the affidavit of Detective George Eaton. (See motion filed by Dennis D. S. McAlevy, dated September 6, 1973). In addition, it was moved that conversations intercepted pursuant to both orders be suppressed on the grounds that there was no proper minimization and for failure of the appropriate authorities to provide the required notice of the interceptions. (Ibid.)

On September 23 and 24, 1973, Detective Eaton testified to circumstances surrounding the issuance of the two wiretap orders.

On November 8, 1971, Eaton gave Assistant District Attorney Clifford Fishman information relevant to securing a wiretap of conversations of Joseph Della Valle over his home phone and the phone at Diane's Bar.

The first order provided for the interception of

> "telephonic conversations of JOSEPH DELLA VALLE over the above described telephones". (904-06).

The information submitted came from Eaton's confidential informant who had allegedly spoken to Della Valle twice in a telephone booth while the detective put his ear to the receiver, on October 29, 1971, and November 2, 1971. The phone booth door was not closed, and traffic sounds intruded on Eaton's ability to distinguish the voice. Both times the informant allegedly identified the voice on the other end as Della Valle, but the second time, Eaton himself could only say the voice "seemed" like to same one he'd heard on the first call. (920-21, 976, 979, 980). Eaton told ADA Fishman that he would have trouble distinguishing Della Valle's voice; nevertheless, neither Eaton nor Fishman explained the voice identification problem in their affidavit in application for the tap. (991, 1099).

Pursuant to the December 8 order, Eaton began monitoring on December 9. He said he had many problems: there were short conversations that made no sense; he had to wait for the right parties to come to the phone; many of the voices sounded the same, and the various nicknames made it even more difficult to identify the speakers (the Detective never used the police alias file to clarify for himself who was who. (1118-1119). (918-919). During the first week, no speakers over the bar phone were definitely identified by Eaton or the other monitoring officers, as Della Valle, but the conversations were

monitored anyway. (1002). It was not until December 19, according to Eaton's hearing testimony on direct examination, that he realized that the voice they had been monitoring for the previous 10 days, identified as "Steve" or "Beansie", a voice they thought was probably that of Della Valle, was not that of Della Valle. (921-923). The officers were aware they might have been listening to the wrong man from December 11, but they continued to monitor "Steve" or "Beansie" as if he were Della Valle. As Eaton put it:

> He seemed to be in this bar a lot, this male, either unnamed or Beans or Steve. And there was a tendency on our part to believe that it was Della Valle. (1003).

> I explained what my problem is with Joseph Della Valle's voice. I assumed all along I was listening to the wrong guy ... (1157).

Indeed, there was substantial evidence presented by Eaton's own testimonial admissions, that months before the Della Valle order, Eaton knew that Beansie was Stephen Della Cava.

> Q. It is your best opinion from defendant's Exhibit N that was shown that you were working with on June 11, 1971, you knew Beansy was Stephen Della Cava?
>
> A. Yes. (1208).

In the Spring and Summer of 1971, Eaton was a chief investigator, and "had the order for the wiretaps" of one Nicholas Cuccinello. (1139). During those taps, he participated in the monitoring of over 3000 calls and it was his habit to go over the tapes and logs of the recorded conversations. (959-960, 1210). Throughout the logs of the Cuccinello taps, "Beansie"

conversations are noted; Beansie's address is noted as 2034 Second Avenue, the address of Diane's Bar and Beansie is specifically identified as Stephen Della Cava. (1102-1103, 1105-1106, 1107-1108). A lengthy conversation of Beansie's of July 16, 1971, which the Detective admitted monitoring and transcribing, was noted and identified in his logs. (1105-1106). A notation appears on a Cuccinello transcription, "Beansy, 2034 Second Avenue, Stephen Della Cava." (1107). On July 8, 1971, the notation , "plant closed and to vicinity of 2034 Second Avenue, Beansy's", appears. (1108). On July 8, 1971, this notation : "Danny, Beansy looking for Big Paddy. Not there, Nicky Red, Stephen Della Cava". (1109). Detective Eaton testified that on July 10, 1971, her personally conducted a surveillance of Beansy's place, Diane's Bar. (1206).

The logs and transcriptions of the Cuccinello taps, identified by Eaton and containing the above references, were received in evidence. (1199-1209). (Def. Ex. J, K, L, E, M, N, O).

The particular spelling "S-T-E-V-E-N" which was used by Detective Eaton in his application for the January 6, 1972 order for appellant Della Cava's conversations, is the same spelling of that name that was used in the Cuccinello log notations in June and July, 1971. (1102-09).

Despite the above admissions that he knew Beansy was Stephen Della Cava in June and July, 1971, Detective Eaton testified that a clear separation

between Della Cava and Della Valle did not occur until December 19, 1971, while monitoring a supposed conversation of Della Valle on the December 8 order. On that day, Eaton heard someone he thought was Della Valle turn away from the bar phone and ask someone in the bar named "Beans" how long he would be in the bar. (922-23). Detective Eaton further testified that he definitely knew then that Beansy was not Della Valle and even though he was authorized by the December 8 order to overhear only Della Valle conversations. (1084, 1089). ADA Fishman, whom Eaton notified on December 20, that the man they were monitoring was not Della Valle, told Eaton to continue to "intercept the conversations of this guy with the thought that we are going to amend the order". (924-25). No amendment was sought until January 6, 1972, when a renewal of the December 8 order became necessary, although Fishman had been told on December 23, by his superior, Mr. Kaufman, that he had enough for an amendment." *

On December 21, Eaton had picked up a conversation between Beans and a male negro later identified as Jack Brown. Beans said he'd see Brown two days later. On December 23, Beans called Capra who told Beans to come up and get the "present", (a word used in at least one other conversation). Eaton watched the bar. Della Valle pulled up in a car, waved and drove away. Two minutes later, Della Cava came out and got into his car, and drove to the social club.

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* Fishman was a rooky at wiretapping and one of the reasons that he felt that Eaton could go on listening was that Eaton had "experience and expertise". (879).

Della Cava went into the club, came out, opened the trunk of a Lincoln Continental, took out a package and put it in his car, drove to Pelham Chateau and came out with a manila envelope. In the Detective's opinion, the package was the same size as 1/2 kilo of heroin. Based on these conversations and comings and goings and other "interpreted" conversations seized while monitoring under the Della Valle order, the Detective made an application on January 6, 1972 for a renewal of the Della Valle order. (925-34).

Pursuant to the January 6 order, two conversations were overheard on February 3, 1972 between Della Cava and Guarino. One was about seeing the other guy, and the second set up a meeting on Fifth Avenue after the other guy was seen. After these conversations, Della Cava was followed by another detective to Jack Brown's apartment building and was seen to come out of Jack Brown's apartment a few minutes later, carrying a black toiletry case. Eaton went directly to Fifth Avenue and when he arrived there, Della Cava and Guarino had already been arrested. Sgt. MacDonald was holding a black toiletry case containing $11,500. (935-41).

Short conversations during the early part of the first wiretap order didn't make sense to Detective Eaton, sothese conversations about being sick and getting better by Monday meant to him that Vino Green wanted narcotics and appellant couldn't deliver. Other conversations suspect to Detective Eaton were (1) a conversation on December 11 wherein Della Cava tells Green he can't help him (2) a conversation on December 27 wherein a party was heard to say,

"The moving van people don't have no point in time," which meant to Eaton, only possibly, that Della Cava, who had not been observed in the moving van business, would have to arrange or rearrange a delivery of narcotics (943-52).

In an opinion dated December 4, 1973, the Court denied Guarino's motion to suppress conversations monitored pursuant to the December 8 and January 6 orders.

Testimony with respect to the question of minimization was heard on September 23, 24, 25 and 26, 1973.

Detective Eaton testified that everything intercepted was recorded, that the machines were automatically activated, but could be manually shut off, and that when the machines were not recording, they were not amplifying. Every call was logged. (911-16). The Detective listened to many entire conversations, even though they didn't involve Della Valle, or narcotics. (1035-41). On December 9, for example, he transcribed an entire non-narcotic related conversation between Sam and Dennis (1005-06, 1012); on December 10, a lengthy call between Della Cava and his girlfriend (1041); on December 11, a call between Fred and Angelo (1050); on December 13, a call between Mel and Frank (1054); on December 14, a call between Sam and Al Shackter (1064); on December 10, a 10 minute conversation between a husband and wife; a six minute conversation between two females; a three minute conversation involving

a wife, child, phone bill and the wife's job as a secretary; a call of over one minute between Della Cava and his son, Carmine; a call between Della Cava and his son, discussing "Mommy", * a December 11 call between a husband and wife; a call on December 12 in which a party said that "Beansy was here", and another between Della Cava and his wife for five minutes; on December 12, between a male who identified himself (not a party named in the order) and a female; on December 12 between Della Cava and his girlfriend; on December 13, a call logged as Beans and his wife; which was not Beans and his wife (1296-1326); on December 16, a call of close to two minutes between a husband and wife, and on December 17, a three minute call between Pete and a female (1520-21).

The Court stated that conversations of under 90 seconds duration would not be considered by it in the tally of statistics with regard to whether or not minimization was reasonably carried out. Counsel objected that duration was not the factor; that the standard was whether the call could reasonably have been cut-off sooner (1071-72), that a conversation between a husband and wife concerning the purchase of steaks should not have been listened to even for a minute (1287), and that some calls of 20 seconds duration could have been cut off earlier (1290).

Michael Giovannello, a New York City detective, testified that he made a statistical analysis of the tapes. He determined that there were 1561 calls on 16 reels of tape, that 409 of those calls were incomplete; that 728

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* Eaton knew Della Valle was not married.

of those calls were cut-off, that 730 of 1159 calls were monitored in full, and that 235 complete calls involving Della Cava were monitored. (1217-51). The detective made no length check on the cut-off calls (1250). He made no distinctions among the calls (1233) and did not determine at what point in the conversations the cut-off came or whether the parties we re about to end their conversation at the point of cut-off (1258). There was no breakdown of Della Cava's phone calls. As to calls monitored pursuant to the December 8, 1971 order, and after December 20, 1971, the following analysis was submitted: 46 calls were made or received by Della Cava; 32 were logged as non-pertinent by Detective Eaton; 20 of those 32 non-pertinent calls were between appellant and his wife, son, daughter, girlfriend or lawyer, and 13 of those exceed 1-1/2 minutes in length; all of the 46 calls, including the 32 logged as non-pertinent, with the exception of five calls, were logged and recorded in their entirety; the five non-pertinent calls which were cut-off were a three minute seven second attorney conversation, a minute conversation with a child; a two minute and one minute conversation with appellant's girlfriend, and a 40 second girlfriend conversation.

Pursuant to the January 6 order, 144 calls were made or received by Della Cava; 139 were recorded and logged. Detective Eaton logged 108 of those calls as non-pertinent, and 60 of them involved calls relative to Della Cava's personal and family life. The five calls not logged in their entirety were a minute call, a 15 second call, a six minute call and a 27 second call with a girlfriend, and a 28 second call with an unknown female.

The Court below opined, in a written memorandum dated December 4, 1973

> it is evident with complete hindsight that a substantial number were properly to be deemed 'pertinent' to the investigation. The exact number we would give today is scarcely decisive, however, for it is clear that the number would be too small to reflect fairly the efforts of the officers on the spot to 'minimize' in light of the limited knowledge available to them. (slip op. at 6).

Besides "limited knowl edge", the Court pointed to other problems which excused the minimization requirement: "changing participants, cryptic references, garbled and noisy reception, long delays ... ". (Id.), "Aesopian jargon" (Id. at 7), the possibility of pertinence ("others sounded suspicious and might have indicated knowledge of criminal activities"). (Id. at 8), and voice identification.

On the requirement of notice, which Fishman testified was dispensed with orally by the New York State Justice (758-60), the United States Attorney conceded that no actual notice was given until May or June, 1973. (1267). The Court said:

> the delays were authorized by the State Justice who allowed the interceptions ... there has never been any remote suggestion of prejudice to any defendant from these asserted improprieties. (Slip op. at p. 18).

Detective Eaton's testimony was relevant also on the issue of the discovery of defendant, Guarino, by the Government. Eaton admitted that Guarino was discovered as a result of the wiretaps conducted which led to his arrest on February 3, 1972 and his identification. (; 1031).

Detective Eaton testified that until December 23, 1971, he did not know Guarino. (1156) Thereafter, he listened to phone calls on February 2, 1972 between Guarino and Della Cava and the interception of those phone calls led to the arrest of Guarino on February 3, 1972 in the company of Della Cava. (1153-55) Guarino, known through the phone calls only as Leo, was then identified as Leo Guarino because of the arrest * and the car he drove was identified. (1153-60)

Guarino and defendants, Capra and Della Cava, moved to controvert the affidavit of Detective Eaton upon which the eavesdropping order was based. The facts and circumstances in connection therewith are set forth in the interest of brevity under point II herein.

Upon Guarino's arrest, the Government disseminated "massive and lurid publicity." Guarino relies upon the statements of fact set forth in defendant Capra's brief in connection therewith and adopts the argument submitted therein.

The trial facts, as set forth in defendant Della Cava's brief are adopted herein in the interest of brevity.

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* Guarino moved pre-trial to suppress any identification or information learned about him which resulted from the arrest which he contended to have been illegal. (See motion filed September 5, 1973 by Dennis D.S. McAlevy.)

I

DEFENDANTS GUARINO, CAPRA AND DELLACAVA WERE PERSONS AGGREIVED BY THE UNLAWFUL SEARCH AND SEIZURE OF THE SUITCASE IN TOLEDO, AND THAT SEARCH, CONDUCTED BY A PEACE OFFICER OF THE STATE OF OHIO WITHOUT A WARRANT OR PROBABLE CAUSE, CONTRAVENED THE FOURTH AMENDMENT

A. The defendants Guarino, Capra and Dellacava were persons aggreived by the search of the suitcase in Toledo.

The defendant, Guarino, filed an affidavit together with the defendant, Capra, in which each adopted the statement in defendant, Dellacava's, affidavit that

> "the bag which was searched by the police in Toledo was owned by me together with the defendants, Capra and Guarino, at the time of the aforementioned Toledo search and seizure."

The trial Court required that this statement, sworn to by Guarino, Capra and Dellacava, be subjected to cross-examination by the Government. On September 17, 1973, the three testified in detail to the formation of a partnership with Joaquin Ramos whereby they all agreed to place a suitcase in the Toledo railroad terminal baggage room containing 6 kilos of heroin and 1 kilo of cocaine for eventual delivery to a buyer known to and arranged by Ramos. (Dellacava 2-33; Capra 34-49; Guarino 55-92).

Ramos had approached Guarino with the opportunity to sell a large quantity of narcotics to buyers known to Ramos. Guarino discussed the terms of the deal with Ramos at Ramos' house and decided that since all of the money was

not to be paid in full prior to delivery, all four should share in the profits equally as partners. Ramos agreed and undertook the responsibility to deliver the narcotics to Toledo. DellaCava, a partner with Guarino and Capra in other legitimate enterprises (a bar and restaurant), purchased a suitcase in a local department store in New York from joint funds. Capra packed the narcotics in the suitcase and gave it to DellaCava who gave it to Ramos. Ramos was to take the suitcase to Toledo.

On October 20, 1971, the locked suitcase, purchased by DellaCava, was checked at the baggage counter of the Penn Central Railroad terminal in Toledo, Ohio. On October 28, 1971, before anyone came to claim the suitcase, it was opened and the narcotics seized. (The circumstances surrounding the warrantless search and seizure are set forth in part B of this point).

The Court denied the defendants standing to move to suppress the results of the warrantless search of the suitcase.

> The evidence, sufficiently at the suppression hearing and then beyond a reasonable doubt at the trial, showed that these movants, in the particular transaction and in many others, consistently demanded that the payment for their narcotics shipments be "up front", i.e., in advance of shipment and delivery ... the movants here had been paid in full for their contraband and had no further interest of any kind either in the wrapping - the suitcase - or the contents. (Slip op. at 5).

The Court's findings that (1) "these movants, in the particular transaction ... consistently demanded that the payment for their narcotics shipments be 'up front'," and (2) "the movants here had been paid in full for their contraband" is totally without foundation in the record of the pre-trial hearing. The Government

presented no proof and the defendants' assertion in their affidavits that they owned the suitcase and their testimony at the hearing stands without contradicition as to the fact that they were not paid in full - all three testified a substantial amount was owed. In fact, delivery to the buyer was never made - the search was conducted three days prior to anyone claiming the suitcase and significantly, Milton Julert, the baggage agent who checked the bag, testified that the man who checked it said he would be back to pick it up in a couple of days.

This fact, testified to by Julert after the defendants' testimony, lends much credence to Guarino's testimony on cross-examination:

> Q. Whoever it was that was supposed to deliver it, the delivery man was supposed to open the suitcase, take out the contents, give it to somebody and then they were supposed to put money in the suitcase and the money was supposed to come back? Is that right or wrong?
>
> A. That's wrong. Supposed to deliver the drugs. When they got it, they were supposed to test it, see if the quantity and quality was okay. If it was, remove the drugs from the valise, put whatever the balance was back into the valise and deliver it to Mr. Ramos and he was supposed to, in time, deliver it to us.
>
> Q. With the suitcase?
>
> A. With the suitcase. That was my understanding. (91-2).

No, the evidence at the hearing does not support the trial Court's findings' but selected portions of the trial testimony - not subject to cross-examination by defense counsel at the trial on the issue of standing - were used by the trial Court to support a finding it desired to make* but could not on the record before it.

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* The pre-trial memorandum filed by the trial Court only indicated that the motion to suppress "will be denied" without setting forth findings of fact or law. ( ).

Each finding of the trial Court finds support only in the trial testimony- and that support is not even conclusive but ambiguous. The first finding that these defendants consistently demanded money "up front" is belied by Ramos' trial testimony concerning a transaction had between Ramos and Morris for two kilos of heroin in the early summer of 1970. Although Ramos compliantly answered the Government's question that the money was to be up front, he then testified that the heroin was given to Morris at the airport by him and Jermain at the same time that Morris gave them $48,000. Ramos then took his profit and not "up front" but afterward gave $40,000 to Guarino and Capra. (275-291). The second finding that the defendants had been paid flies in the face of Ramos' trial testimony that there was a $38,000 balance owed on the Toledo transaction at the time of the search, (437), which was supported by documentary evidence introduced by the Goverment (Government Exhibit # 21) and alleged by the Government to have been written by the defendant, Capra.

The evidence elicited at the hearing demonstrates conclusively that the defendants' ownership of the suitcase carried with it a "reasonable expectation of privacy" and as such, conferred standing upon them to object to its search and the seizure of its contents. The denial of standing in this case relies wholly upon a lingering belief that Fourth Amendment protections are only co-extensive with protection against trespass to property. That belief was firmly laid to rest in Warden v. Hayden, 387 U.S. 294 (1967):

> "the premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal objection of the Fourth Amendment is the protection of privacy rather than of property, and have increasingly discarded fictional and procedural barriers resting on property concepts."

The Fourth Amendment protects people, not places. Katz v. United States, 389 U.S. 347 (1967). In holding that the petitioners' Fourth Amendment rights had been violated by clandestine surveillance, Katz pronounced the following test delineating the right protected by the Fourth Amendment:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ... but what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected. Katz, supra, at 351-352.

What the defendants sought to preserve as private in this case was the locked suitcase. Even though that suitcase was not within their physical possession, it was locked and placed in the hands of the Penn Central Railroad for their benefit and for no others benefit. No constricture of the Fourth Amendment can abrogate that "reasonable expectation" of the defendants that the luggage, locked as it was and placed in the hands of a bailee for their benefit, would not be searched without their consent.

> "(T)he argument ... applies to searchable (enclosed) effects on the premises of another. If X leaves his closed suitcase in Y's apartment, this is not authorization to Y to open the suitcase or for Y to allow others to open the suitcase." United States v. Poole, 307 F. Supp. 1185, 1189 (D.C. La. 1969).

The delivery of a package to a common carrier as in this case does not forfeit one's right of privacy thereto. Ex Parte Jackson, 96 U.S. 727, 733; Corngold v. United States, 367 F. 2d 1. Corngold held that the right of customs agents to search a package in the possession of a common carrier must rest upon a showing that the defendant himself waived his personal right of privacy by word or deed directly or through an agent. See also Stoner v. State of California, 376 U.S. 489. Corngold further held that the mere surrender of custody to a carrier did not forfeit the defendant's right to privacy since no express authorization was given to the carrier to consent to any search of the package. No evidence was elicited by testimony or otherwise that the defendants, in any way, waived their right of privacy or expressly authorized a search of the suitcase by anyone. Nor was there evidence in the record which gave the Railroad-bailor a right to open the suitcase. In fact, the evidence was clear from the testimony of the Railroad baggage agent that had the bag been lost the limit of the Railroad's liability would have merely been $25.00, (1379) and that the Railroad was required to hold the suitcase for, at least, 60 days prior to disposing of unclaimed luggage. (1462-64).

Even the renter of a public locker is entitled to the protection of the

Fourth Amendment as if he were in the privacy of his own home. United States v. Durkin, 335 F. Supp. 922 (D.C.N.Y. 1971).

Similarly, a package or parcel placed in the mails is protected against unreasonable search and seizure. United States v. Van Leeuwen, 397 U.S. 249 (1970). The circumstances presented in Van Leeuwen and the facts in this case are not distinguishable. In Van Leeuwen, the Supreme Court examined whether the opening of a package placed in the mails was reasonable or unreasonable. No question was raised whether the person who placed the package in the mails had standing to object to the search and seizure nor could any objection be raised since the reasonable expectation of privacy gave that defendant standing to object to the search. It was irrelevant in Van Leeuwen that the mailed parcel was addressed to someone other than the defendant in that case since the defendant who mailed it had every reasonable expectation that the privacy of the parcel would be safeguarded. So too did the defendants in this case have every reasonable expectation that the privacy of the suitcase which they owned would be safeguarded notwithstanding the fact that the Railroad was holding it temporarily for their benefit.

In United States v. Hunt, 14 Cr. L. 2217 (D.C.N. Tex.), a tape recorder seized from another's automobile was suppressed upon the motion of the defendant who owned it. The Court said at 2218

> "The uncontradicted evidence produced at the evidentiary hearings in this Court can lead only to the conclusion that the Hunts owned, and thus had a proprietary interest in, the tape recorder and tapes since they ultimately paid for both the tape recorder and the tapes. This proprietary interest is sufficient to give the Hunts standing to challenge the search and the evidence gathered thereby."

The Government has taken issue against the standing of defendants Capra, Guarino and Dellacava to assert Fourth Amendment rights in connection with the search and seizure of the suitcase by relying on Brown v. United States, 93 S. Ct. 1565 (1973), and contends that since the defendants Capra, Guarino and Dellacava, (a) were not on the premises at the time of the contested search and seizure, (b) had no proprietary or possessory interest in the premises, and (c) were not charged with an offense that includes as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure, no Fourth Amendment rights of the defendants were violated.

The facts as elicited at the hearing below demonstrate conclusively and without contradiction by witnesses for the Government that each of the defendants owned the suitcase at the time of the warrantless search and seizure. A close reading of Brown v. United States, supra, reveals that the petitioner in that case who sought standing to suppress seized evidence had transferred possession to a third party for monetary consideration approximately two months before the challenged search which took place on the premises of the third party. Moreover,

he had never alleged ownership or possession of the seized evidence. The testimony of Capra, Guarino and Dellacava is uncontradicted that the ownership of the satchel at the time of the warrantless search and seizure was theirs and they alleged it by affidavit and testimony.

Significantly, the Supreme Court in Brown, supra, at 1569 compared United States v. Price, 447 F. 2d 23, 29 (2nd Cir., 1971), cert. den. 404 U.S. 972 (1971), wherein this Court rejected the Government's challenge to standing in that case even though the defendant therein was not present at the time of the search and seizure, and the possession charged occurred four months prior to the search and seizure. This Court's decision in Price, supra, rested solely upon the ground that

> "there is standing where possession is an essential element of the offense. The rule otherwise would produce results that would bear no relationship to the policies underlying the Fourth Amendment and the view expressed in Jones that the Goverment should not be allowed to take inconsistent positions, i.e., that a defendant did not have possession so as to challenge the search but is guilty of possession." United States v. Price, supra, at 29.

The Court in Brown, supra was careful to note that the "vice of allowing the Government to allege possession as part of the charge and yet deny that it was sufficient for standing purposes, is not present", Ibid, at 1569, and went on to cite two cases, United States v. Cowan, 396 F. 2d 83, 86 (2nd Cir., 1968) and United States v. Bozza, 365 F. 2d 206, 223 (2nd Cir., 1966) where the vice was not present. Cowan held that by leaving luggage in a hotel room without

paying his bill, the defendant abandoned his property by relinquishing all of his title, possession or claim to it and the hotel's right to seize the property was supported by the laws of the State of New York in exercise of the hotel's lien to collect its unpaid bill. Bozza denied standing to contest a search and seizure on the grounds that the property belonged to the post office, the defendant had abandoned its possession to another, the defendant was not present at the home wherein the search and seizure were made and the defendant was not charged with an offense of possession of the gun which was seized. There is no evidence of abandonment in the record below and no evidence was presented which indicated that the Railroad had any right to search the suitcase.

Brown defined the vice as "allowing the Government to allege possession as part of the charge and yet deny that it was sufficient for standing purposes" (emphasis added). These words, carefully uttered, do not define the possession required for standing purposes to be the exact possession necessary to convict. It is only necessary that the possession sufficient for standing be possession "as part of the charge." The possession of the suitcase in Toledo was central to the Government's charge of possession in New York and the Court below, therefore, charged:

> "Specifically to speak in terms of what the Government contends and what you may find to have been proved or not proved, the contention is that the transportation of the 5-1/2 kilos of heroin to Toledo, Ohio, as charged in the fourth count, was allegedly done pursuant to the direction or with the participation of Capra, Guarino, Dellacava and Jermain.

> If you find that kind of direction and control ... this would satisfy the requirement of possession within the meaning of the statute (3926).

It is, therefore, clear that "part of the charge" against these defendants was their dominion and control over the suitcase and its contents in Toledo. *

Moreover, the entire import of the Government's questions put to these defendants while they were on the stand asserting their constitutional rights, was to develop evidence to contradict the defendants' assertion of ownership in the seized property. The vice recognized in Brown was confirmed at the hearing and this Court should not allow the Government to conduct a tongue in cheek cross-examination for the purpose of denying possession in a standing hearing and, thereafter, to conduct a direct examination of witnesses at the trial in an attempt to prove the same or connected possession against these defendants.

While at the hearing, the Government attempted to show the contents of the suitcase were fully paid for; the direct evidence at the trial was that money was owing (435, 437). The prosecutor even argued to the jury that money was owed.

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* Although constructive possession was sufficient to convict, it was held in Brown not to be sufficient to confer standing. However, the possession at the time of the search in Brown as not used to support the possession charged in the indictment in any way.

> "At this point, Ramos testified that Hooks Capra asked Dellacava to bring over a piece of paper so he could calculate the balance that was still owed ... (3860). But how much money did Morris pay. He only paid $145,000 leaving a difference of $38,000 still owed. (3862).

Thus, at trial, the prosecutor was relying on, and the Court so charged, appellants' control over the delivery and deposit in Toledo, ie. possession in Toledo, and membership in a conspiracy that embraced both the New York and Toledo possessions separated by a matter of days, as the evidence sufficient for conviction on the substantive counts of possession in New York. Toledo possession, central to the Government's case for conviction, was, neverthless, denied by the Government and the Court below when appellants asserted their Fourth Amendment rights.

This method of prosecution "is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." Jones v. United States, 262 U.S. 251, 263-264.

One further point on the procedure used by the Government, and adopted by the Court, to deny appellants standing in this case: the withholding of a witness (Ramos) from testimony at the hearing to insulate him from defense cross-examination there, and then the Court's reliance on that witness' trial testimony to deny the motion to suppress. This Court has disapproved of such procedures in the grand jury, where the Government would present witnesses

whose knowledge of the events was hearsay in order to protect the trial testimony of those witnesses with direct knowledge. United States v. Borelli, 336 F. 2d 376, 391-392 (2nd Cir., 1964); United States v. Payton, 363 F. 2d 996 (2nd Cir., 1966) cert. den. 385 U.S. 993 (dissenting opinion, Judge Friendly); United States v. Estepa, 471 F. 2d 1132 (2nd Cir., 1972). There is no reason to sanction that procedure in this context, where the Court below accepted the testimony of the missing witness as conclusive of the issues.

As to the Court's reliance on trial testimony to deny the motion to suppress, the Third Circuit has recently said,

> The defendant's contend the suppression hearing and determination during trial could not have resulted in a fair determination on their pre-trial motions to suppress. We think the rulings on these motions could and should have been made before evidence was taken. However, we believe the error was harmless because all the evidence challenged in the defendant's motions was properly admissible. We are unwilling to assume that the Court's determination was influenced by the posture of the case at the time he ruled. We emphasize that a pre-trial determination avoids the creation of such an impression and should be the general rule absent unusual circumstances. United States v. Weinberg, 478 F. 2d 1351, 1354 (1973).

Here, the Court specifically used the "up front" testimony that came only from the trial to finalize its written opinion on the motion to suppress but failed to use other testimony of Ramos at the trial which supported the defendants' assertions at the hearing that they, Capra, Guarino and Dellacava and Ramos, were partners. Ramos testified that they

"came to an agreement that we would pay the guy $5,000 to take the suitcase out there" (33). (Emphasis added).

and that Dellacava was told by Guarino to buy a new suitcase to pick the drugs up in (332-333).

The failure of the Government to produce Joaquin Ramos as a witness concerning the issue of standing also compels the inference that his testimony would be unfavorable to the Government's position on the standing issue and that inference taken together with the direct testimony of the defendants, left the Court no ground for denying the defendants standing to suppress the evidence in the possession of the Government which was seized in Toledo without a warrant. Trial counsel could hardly have been expected to question Ramos at the trial about the admitted partnership between him and the defendants. Yet, his testimony was, nonetheless, used by the Court below to unfairly buttress and decide the issue against the defendants.

Since, therefore, (1) the defendants Guarino, Capra and Dellacava asserted ownership of the suitcase at the time of the search; (2) their ownership was never contradicted or impeached at the hearing; (3) the Government alleged the Toledo possession as part of the charge of Conspiracy (Count I) and possession in New York (Counts IV and V), the defendants were aggreived persons entitled to move to suppress the evidence seized in Toledo and all other evidence resulting therefrom.

The trial Court's reliance on United States v. Epstein, 240 F. Supp.

80, 82 (S.D.N.Y. 1965), is misplaced, because the evidence in that case was not seized; a Government informer, working with the defendants, picked up the evidence from a subway locker and turned it over to the authorities. He had obtained, albeit surreptitiously, permission from the defendants to take the property in the first place. Epstein cited to the different situation, as in this case, wherein the Government seeks by process or seizure to obtain evidence in the physical possession of a third party to be used against the owner. There, the owner (defendants in this case), has standing to object, notwithstanding possession in another (the Railroad). United States v. Guterma, 272 F. 2d 344 (2nd Cir., 1959); Schurmmer v. United States, 232 F. 2d 855 (8th Cir., 1956) cert. den. 352 U.S. 833. Furthermore, to the extent that Epstein and the Court's opinion below are based on narrowly defined property interests as determinative of Fourth Amendme nt rights, they have been rejected. Warden v. Hayden, supra. No interest in the effective administration of law enforcement is obstructed by recognizing appellants' real expectations with regard to the property seized in this case, and "to bow to ("subtle distinctions, developed and refined by the common law in evolving the body of private property law") in the fair administration of the criminal law ... would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." Jones v. United States, 262 U.S. supra at 266-267.

B. The search of the suitcase was directed and participated in by a Penn Central Railroad Policeman, a peace officer of the State of Ohio with full police powers. As such, the strictures of the Fourth Amendment and its exclusionary rule are applicable.

The existence of the suitcase came to the attention of Albert Blevins, Captain of Police for the Penn Central Railroad in Toledo, on Wednesday, October 27, 1971 (1419). Blevins was in charge of nine officers assigned to the Toledo division of the Penn Central Railroad Police whose duty it was to protect the railroad property and to conduct investigations connected with it (1386). He was commissioned by the State of Ohio (1396, 1416), had the right to arrest people (1417), investigated crimes on railroad property (1417), and carried a badge with the seal of the State of Ohio on it. (1419). He learned of the suitcase from Charles Sibold, a Penn Central baggage clerk, who told him that it had been checked under suspicious circumstances (1386). It was explained to Blevins that the suitcase which had been checked on October 20, 1971 was supposed to have been picked up in a day or two by the man who had checked it (1387). Sibold communicated his concern to Blevins that the bag "possibly could contain explosives."* Blevins, agreed with Sibold that the circumstances were suspicious, and unsuccessfully attempted to open the bag with him. Sibold then asked Blevins to get assistance in unlocking the suitcase (1388-89, 1398). Blevins first obtained a Samsonite key and when that did not work, he called his primary contact in the Toledo Police Department, Detective

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* This concern was based on Sibolds' feeling that the suitcase was heavy and did not seem to contain clothes because it "swished" when shook (1435-37).

George Ryan, for aid in opening the suitcase (1390). Blevins told Ryan that he believed the suitcase might contain "the makings of a bomb." Blevins' belief and curiosity concerning the contents of the bag were based both upon what Sibold told him and a similar experience which he had had in Cleveland as a railroad policeman where a bag which had been checked, contained bomb materials (1401, 1417). On the next day, October 28, Blevins directed Sibold that if someone came to pick up the suitcase, he was to get a description of the man's physical appearance, request him to sign the back of the check to obtain a handwriting sample and attempt to take the license plate number of his car (1455-56). Later that day, Detective George Ryan arrived at the Toledo Railroad Terminal with two other Toledo Police officers, Bedal and Beavers, to "assist a fellow officer" (1486-87) and was brought by Captain Blevins to the baggage area where the suitcase was being held (1482-83). Blevins, the three Toledo police officers and Sibold went to a rear area of the baggage room where Blevins supplied paper clips for the purpose of opening the locks (1483, 1505). The lock was sprung by the Toledo police. Sibold was told by the Toledo police to open the bag and after doing so, officer Beavers reached into the bag, picked up a plastic bag, opened it and then showed its contents to Ryan (1497, 1499).

Captain Blevins was, at the time of the search and seizure, a commissioned railroad police officer, pursuant to Ohio Revised Code Section 4973.17 and all applicable provisions in Chapter 4973. Railroad police are commissioned in Ohio to possess and to exercise "the powers of and (to) be subject to the liability of

municipal policemen while discharging the duties for which they are appointed." Ohio Revised Code 4937.19 Railroad companies, pursuant to Ohio Revised Code 4937.19, are authorized to pass rules and regulations which have the effect of State law on the company property and the railroad police are authorized to make arrests for violations of such rules and regulations in addition to being empowered to arrest for the violation of other State law on the property of the company. Moreover, that section requires jailers in Ohio to accept as prisoners persons arrested by railroad police.

As a police officer commissioned by the State of Ohio, the search which was participated in and directed by Captain Blevins was the search of a Governmental agent. The Supreme Court of Ohio in the New York, Chicago and St. Louis Railroad Company v. Fieback, 87 Ohio 254 (1912) held

> "a policeman who is appointed and commissioned by the Governor, under Section 3427 and 3428, revised statute (Ohio revised code section 4937.17 - 18) is a public officer, deriving his authority from the State."

United States v. Belcher, 448 F. 2d 494 (7th Cir., 1971), directly held that the conduct of railroad policemen was governmental action and, thus, the Fourth Amendment is application. The Government in Belcher contended, as it does here, that the conduct of the railroad security men was not "govermental action" and, thus, the Fourth Amendment was inapplicable. The Court held:

> "We cannot accept this contention. The men in question both indicated they were railroad policemen, that they carried guns and had the power to arrest. It seems clear they had authority as police officers under the Illinois Statutes, Ill. Rev. Stat. Ch. 114, Section 98 (1969). United States v. Belcher, supra at 497.

The defendant in Belcher was the driver of a truck owned by his employer which was on railroad property for the purpose of taking deliveries only of merchandise for which he had freight bills. The railroad police searched the trunk and the evidence found was introduced at Belcher's trial. The Court applied the full stricutres of the Fourth Amendment to the railroad policemen despite the fact that the merchandise seized was in the hands of a common carrier, that the carrier had the duty of seeing that the merchandise was delivered to the consignees and that there should be, perhaps, some privilege on the part of the carrier while the truck was still on its premises to see by inspection that incorrect merchandise had not been loaded.

Lustig v. United States, 338 U.S. 74 (1949), is dispostive of when a search must be considered a police search. In Lustig, State police officers were in the process of conducting a search which would not have been admissable in a Federal case had the same search been conducted by Federal agents. During the search, the Federal agents were called by State police officers to come to the hotel where the search was being conducted. The Court noted specifically that the Federal agents did not request the search and were not the moving force behind it and neither was

the search by local police being done to aid the enforcement of any Federal law but, in fact, was being conducted by local police officers solely for local purposes.

Since Lustig arose prior to the Supreme Court's ruling in Mapp v. Ohio, 367 U.S. 637 (1961), at a time when Wolf v. Colorado, 338 U.S. 25 (1949) was the established rule, a search by a State police officer was as constitutionally insignificant as a search by a private person. The Government in Lustig, therefore, sought to uphold the introduction of the evidence which had been seized by local police officers arguing as the Government does here that there is a constitutionally significant difference between an agent conducting the search and the search being conducted in his presence. The Court answered saying at 338 U.S. 78

> "to differentiate between participation in the beginning ... and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment...".

The test, therefore, pronounced in Lustig and heretofore never overruled or changed by the Supreme Court is whether an officer participated in the search before its end purpose was accomplished.* The Court said at 79

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* Although the "silver platter" doctrine expressed in Lustig was rejected in Elkins v. United States, 364 U.S. 206 (1960), the doctrine of Burdeau v. McDowell, 256 U.S. 465 (1921) was not affected or impaired by Elkins or Rea v. United States, 350 U.S. 214 (1956). See also United States v. Goldberg, 330 F. 2d 30 (3rd Cir., 1964), United States v. Maguire, 381 F. 2d 306, nl. 5 (2nd Cir., 1967). Lustig, supra, to the extent that it expresses the Supreme Court's ruling in connection with what constitutes constitutionally significant participation of public officers stands unaffected by Elkins.

> "it is immaterial whether a Federal agent originated in the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it."

It is, therefore, immaterial whether the railroad employees' conduct was consonant with their employer's duties and rights either as a non-gratuitous bailee or as a common carrier; for the railroad, had hired and employed Captain Blevins as a policeman empowered by the legislature of Ohio with full police powers to protect its property against "even modest, if not chimerical, dangers of explosions or other kinds of destruction." The rules and regulations of the railroad under which Captain Blevins acted had the force of State law and his actions which the trial Court found to be consonant with those rules and regulations, was, therefore, official action sanctioned by the State of Ohio. It may be, although defendants do not concede it, that the presenceof Toledo police officers was only for the purpose of "precautionary assistance." Nevertheless, as the District Court found,"their presence was primarily service to those who had enlisted their aid" and the one who had enlisted their aid was a "fellow-officer", - railroad policeman, Captain Blevins. Captain Blevins, curious about the bag and its contents, acted as an investigating police officer when he directed Sibold to get the physical description, handwriting and license plate number of anyone who picked up the bag. He called Toledo Police officers to help him open the bag and he participated in the actual unlocking of the case.

Nothing cited by the Court below supports the conclusion that the search conducted in Toledo was a "private search." The authorities cited in denying the

motion to suppress are clearly inapposite.

In United States v. Cangiano, 464 F. 2d 320 (2nd Cir., 1972), the agents were not present when the packages were opened; United States v. Blum, 329 F. 2d 49 (2nd Cir., 1964) turned on the fact that the carrier which had possession of the package - R.E.A. - had reserved the right to open packages under its express classification; Gold v. United States, concerned a search made by airline employees who were not commissioned police officers - outside the presence of Government agents; in United States v. Burton, 475 F. 2d 469 (8th Cir., 1973) Braniff airline employees who were not commissioned police officers opened the bag and Government agents did not become involved until after the search was completed; United States v. Echols, 477 F. 2d 3 (8th Cir., 1973) was decided on the basis of a T.W.A. regulation which allowed the airline to inspect and open its cargo; Wolf-Low v. United States, 391 F. 2d 61(9th Cir., 1968) involved a search by an airline employee - not a commissioned police officer.

Corngold v. United States, supra, where Government agents participated in the search for their own purposes is dispositive herein. As in Corngold, Captain Blevins was investigating based upon his own independent experience as a policeman.

Captain Blevins, who had experienced an incident in Cleveland where "bomb makings" were in a checked bag, developed his own independent, subjective judgment causing him to act in his official capacity as a railroad policeman. Thus, he communicated this concern to Detective Ryan of the Toledo Police and further told Ryan that he wanted the bag opened for that reason. (1488-91). Sibold's request

for assistance was not made to his civilian superior but to Captain Blevins who directed the Toledo Police to the baggage room and instructed Sibold to obtain the name, physical description, handwriting sample and license plate number of anyone who came to claim the suitcase.

The investigatory directions of Blevins, seeking to prevent either a violation of State law or to enforce Railroad regulations which had the full force and effect of State law (Ohio Revised Code 4937.19), clearly distinguish the facts herein from the non-investigatory actions sanctioned by the Supreme Court in Cady v. Dombrowski, 413 U.S. 433 (1973). Neither is Cady applicable herein on the grounds of "exigent circumstances." The suspicion that there were "bomb makings" was based on totally innocuous circumstances. In fact, Julert, who had fleeting thoughts about a bomb, dismissed them immediately. (1334, 1346). Julert's one concern was that the bag should be safe which clearly gave no reason for a search. (1337). Sibold based his suspicion on Julert's fleeting thought of a bomb and a swishing sound he heard when he shook the suitcase. (1435-36).

In spite of Julert's fleeting suspicion about a bomb, Sibold's similar suspicion and Blevins' experience in Cleveland, they did not do anything until October 27, seven days after the bag was checked at which time Sibold first spoke to Blevins (1438-39). No precautions were taken as if there was a possibility of a bomb. The trial Court instead found that all of their concerns were "modest,

if not chimercial"*, certainly not the concern of the officer in Cady who "reasonably believed (the trunk of an automobile) to contain a gun". Id. at 448.

Thus, the warrantless search of defendant's suitcase, directed and participated in by a commissioned police officer of the State of Ohio, was a search made without probable cause and under chimerical circumstance which could not support a reasonable belief of danger or other exigent circumstances. Accordingly, the evidence seized as a result of that search and all of the evidence resulting therefrom should have been suppressed.

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* Chimerical as defined in Webster's New Universal Dictionary, Unabridged, 2d ed. is:

1. imaginary; fanciful; fantastic; wildly or vainly conceived; that has or can have no existence except in the imagination; ...
2. absurd; impossible.
3. indulging in unrealistic fantasies; visionary."

II

THE TRIAL COURT IMPROPERLY (1) DENIED DEFENDANTS A HEARING TO DETERMINE THE TRUTH OR FALSITY OF DETECTIVE EATON'S AFFIDAVIT IN SUPPORT OF THE EAVESDROPPING ORDER DATED DECEMBER 9, 1971 (DIANE'S BAR I), AND (2) DENIED DEFENSE COUNSELS PETITION FOR A WRIT OF HABEAS CORPUS AD TESTIFICANDUM FOR THE PURPOSE OF OFFERING TESTIMONY TO MAKE A THRESHOLD SHOWING OF FALSITY OF DETECTIVE EATON'S AFFIDAVIT

By motion dated September 6, 1973, defendant, Guarino's, trial counsel moved to suppress evidence seized as a result of the interception of telephone conversations pursuant to the New York County Eavesdropping Order dated December 8, 1971 (Diane's Bar I) on the ground, inter alia

> "11. The affidavit submitted in support of the above order is materially perjurious for the following reasons:
>
> (a) In paragraph 14 and 15, Detective George Eaton swears that he overheard a conversation between his confidential informer and Joseph Della Valle on October 29, 1971 and November 2, 1971. Those conversations were used by him to establish probable cause to believe that Joseph Della Valle was using the above phones for narcotics negotiations.
>
> (b) I am informed that Joseph Della Valle denies that such conversations took place between him and the affiant's informer on the above phones or on any phones.
>
> (c) There is evidence of this perjury in the transcript of United States v. Sperling, 73 CR 441 and in prior affidavits submitted by Detective Eaton, which information counsel believes should be developed at a hearing."
> (Affidavit of Denis D.S. McAlevy, sworn to September 6, 1973).

Counsel for defendants, Capra and Dellacava similarly moved for suppression

on the ground of material perjury.*

Prior to the pre-trial hearings, the Government, by letter dated September 7, 1973, stated:

> "The initial order dated December 8, 1971 authorizing the wiretap on Diane's Bar was secured on the basis of affidavit which did not directly rely on any prior electronic eavesdropping. A confidential informant described in the supporting affidavits supplied part of the probable cause for this application.
>
> As set forth in the affidavit of Detective George Eaton at paragraph 3, the informant was arrested in April, 1971. We are informed that this arrest resulted from information obtained from a court-authorized wiretap on telephone number (516) 293-2072 located at 104 Lockwood Avenue, Farmingdale, Long Island and telephone number (516) 293-2372 located at 300 Main Street, Farmingdale, Long Island." **

Detective Eaton took the stand on September 23, 1973, to testify at a minimization hearing. His direct and cross-examination, related solely to the issues of why he intercepted conversations of DellaCava, Capra and Guarino during December, 1971, and part of January, 1972, although none of them was a named party to the eavesdropping order and none of their conversations were with the party named in the order. It was assumed by the Government during his testimony that a "probable cause" hearing would certainly follow. (962).

When defense counsel began to ask Eaton about the circumstances of the phone calls allegedly made by the confidential informer, as set forth in paragraphs

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* There cannot be any question regarding the defendants' failure to submit their own affidavits in support of this issue since they had no knowledge of the circumstances detailed in Eaton's affidavit.

** Eaton's testimony in United States v. Sperling, 73 CR 441 establishes that the two phones mentioned above were Michael Cassese's.

14 and 15 of his affidavit, (969-70), the issue of the informer's identity first surfaced and defense counsel requested that the Government supply the location of Donald Bode, the person alleged by the defense to have been Eaton's confidential informer (974-75). Counsel informed the Court that he knew Bode to be the informer (971) and the Government, without conceding that Bode was the informer, represented that they knew the informer's name (973-74) but that

> "the Government will take the position that a a subsequent hearing, it is not our obligation to produce him because they are fully aware of who he is." (973).

The Court ordered the Government to "check and let Mr. Slotnick know about his whereabouts for the purpose of being subpoenned."

> MR. SLOTNICK: For the Court's information, we have been attempting to locate him. I have a private investigator who is attempting to locate this man.
>
> THE COURT: For this case?
>
> MR. SLOTNICK: That is correct. (Ibid)(974).

The defense effort to locate Donald Bode was unsuccessful. Thus, the defense was left without an opportunity to present the one person who could testify that (1) he was an informer for Eaton who began to cooperate as a

result of his arrest in April of 1971, (See Eaton's affidavit of December 8, 1971, paragraph 3); (2) he did not make the phone calls alleged in paragraphs 14 and 15 of Eaton's affidavit; (3) nor did he ever use a cover in any prior investigation as alleged by Eaton in paragraph 35 of his affidavit and (4) finally that he did not cooperate in connection with an investigation which led to the arrest of five individuals for possession and/or sale of heroin. (See Eaton's affidavit, page 2, paragraph 3).

The trial Court, thereafter, refused defense counsel's request to recall Detective Eaton as a defense witness for examination in connection with controverting his affidavit (1525-29). . Application was then made to the Court for a writ of habeas corpus ad testificandum for the purpose of calling Michael Cassese as a defense witness to controvert the warrant. Defense Exhibit T for identification, the petition of Denis D. S. McAlevy, supported by his affidavit set forth that

(1) Michael Cassese was arrested in April 1971 with Donald Bode by Detective Eaton;

(2) It was conceded by the Government at a pre-trial hearing in United States v. Sperling, 73 CR 441, that either Michael Cassese or Donald Bode became an informer for Detective Eaton in April, 1971 as a result of their arrests; (See also 1536).

(3) Michael Cassese would testify that he did not cooperate with Detective Eaton; (See also 1537).

(4) The five arrests and convictions of persons alleged to have been a result of the informer's cooperation were, in fact, arrests of Michael Cassese, three other members of his family and Herbert Sperling, none of which were as a result of the informer's cooperation for the arrest of the four Casseses, took place prior to the time when Detective Eaton obtained his informer and the arrest of Herbert Sperling came as a result of a wiretap.

The writ was denied by the Court. Accordingly, defense counsel was precluded from even establishing a threshold fact. Moreover, since Cassese knew Bode, his testimony was necessary in order to controvert the assertion in Eaton's affidavit that Bode had used a cover name.

The Supreme Court has yet to pass directly on the extent to which a Court may permit the testing of the truth of an affidavit supporting a search warrant when the allegations of the affidavit are sufficient on their face to establish probable cause. See Rugendorf v. United States, 376 U.S. 528, 531. This Court has spoken of the issue in United States v. Freeman, 358 F. 2d 459, (2d Cir., 1966).

> "Such a procedure (challenging the veracity of the underlying affidavit supporting the warrant) would diminish the danger of a warrant issuing on an officer's good faith misjudgment as to the reliability of an informant, as well as dangers of police laxity and bad faith. The temptation for officers to include unjustified recitals of informants' reliability would be reduced." Id. at 463 n. 4.

The Seventh Circuit, en banc, has recently held that:

> "a defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit, if he has made an initial showing of either of the following: (1) any misrepresentation by the Government agent of a material fact, or (2) an intentional misrepresentation by the Government agent, whether or not material." United States v. Carmichael, 14 Cr. L. Rep., November 14, 1973, 2129.

Defendants attempted, through Michael Cassese, to make an initial showing that Donald Bode was the informer and that the arrests and convictions upon which the informer's reliability was based, occurred prior to him becoming an informer. Although this showing would only have attacked one part of the affidavit, (the informer's reliability),

> "if deliberate Government perjury should ever be shown, the Court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate Government wrongdoing." Ibid.

The testimony of Detective Eaton was sufficient in itself to allow the defense to go forward and examine him concerning the veracity of his affidavit. First, Eaton failed to state in his affidavit that the phone call was made in an open phone booth with street sounds hampering his listening and with his and the informant's ear pressed to the receiver of one phone instrument (980, 1146-47). It was significant enough to mention these adverse conditions to Mr. Fishman, the Assistant District Attorney who prepared the affidavit (749-750) and to discuss the conditions with him (823). Yet, the affidavit merely states at paragraph 14:

"I was present at 50th Street and Lexington Avenue when my confidential informant and I observed my informant dial telephone number 722-9595 and the informant had a conversation with Joseph Della Valle which I overheard." (Emphasis added).

Neither does the affidavit infer in any way nor state directly that Eaton believed he would have a problem identifying Della Valle's voice. Yet, that problem was discussed with Fishman who knew about it when he prepared Eaton's affidavit (823). Neither did Eaton inform the Justice that he was having difficulty identifying Della Valle's voice (1148). Moreover, the alleged conversation is set forth in the manner of one which was transcribed:

Male (in bar): Hello, Mondo's

Informant: Hello, is Buster there?

Male: John?

Informant: Yes.

Male: No, but his brother JOE is here.

Informant: Okay, then let me talk to him.

Male: Hold on.

JOSEPH DELLA VALLE: Yeah, who's this?

Informant: Peter, you know, Eddie's friend from Long Island.

JOSEPH DELLA VALLE: Yeah?

Informant: I was looking for John.

JOSEPH DELLA VALLE: He aint's around, what do you want?

Informant: Can we talk?

JOSEPH DELLA VALLE: Yeah - but use houses.

Informant: Okay - how much with four rooms?

JOSEPH DELLA VALLE: 18.

Informant: Should I come down to the Bar?

JOSEPH DELLA VALLE: Not yet, first call me at home Monday or Tuesday about 8 o'clock, do you have the number?

Informant: Yeah, it's good, right.

JOSEPH DELLA VALLE: Don't worry, call me.

Informant: Okay, so long.

The fact is that the conversation was not taped (1147) but had been recreated on a yellow pad after Eaton, his partner and the informant had discussed the call amongst themselves (1145-46).*

These facts were certainly not immaterial to the issuance of the eavesdropping.

> "if the facts stated in the application are derived in whole or in part from the statements of persons other than the applicant, the sources of such facts must either be disclosed or described..."
> New York Criminal Procedure Law, Section 700.20.
> (Emphasis added).

Finally and even more persuasive, we submit, is the fact that the Government put Eaton's good faith and veracity in issue by offering Eaton's testimony to explain why facially illegal interceptions had been made by him.

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* The foregoing applies to the alleged conversations of October 29, 1971 and to the alleged conversation of November 2, 1971 between the informant and Della Valle.

Certainly, the defense had a right to inquire whether or not the affidavit was a sham concocted merely to gain surreptitious surveillance over Stephen Della Cava not Joseph Della Valle, when Eaton finally admitted after persistent cross-examination that he knew Della Cava's name, identity and nickname "Beansy" six months prior to the Della Valle application.

> Q. It is your best opinion from defendant's Exhibit N that was shown that you were working with on June 1, 1971, you knew Beansy was Stephen Della Cava?
>
> A. Yes. (1208)

Supporting the attack on Eaton's good faith is the curious circumstance that the Government could only point to one conversation of Della Valle intercepted on the bar phone from December 8, 1971 to January 6, 1972 whereas Eaton, without prior planning, had, miraculously it seems, been able to reach Della Valle at the bar through his informer on the one and only call made to the bar.

Moreover, defendants' demonstration to the Court below that from December 9, 1971 through December 19, 1971, Eaton monitored without regard to whether Della Valle was a party or not lends further evidence to the contention that a general warrant was an ulterior motive to the eavesdropping application. (1287-1329, 1512-1523, 1548-1560). The defense demonstrated, through selected conversations played for the Court, that in spite of the clear indication that Della Valle was not a conversing party, interceptions were made for as much as ten minutes.

One last example supporting the defense theory is the first conversation involving the defendant, Della Cava. It was intercepted on December 11, 1971 at 19:16 hours, and initially marked non-pertinent by the monitoring officer (1165). That conversation was subsequently reviewed and replayed after December 11, 1971 by Detective Eaton (1166), and at that time, was marked EP denoting an extremely pertinent conversation. Neither on the date that the conversation was monitored nor at any time subsequently thereafter, was that conversation marked in the logs as a conversation of Joseph Della Valle, the named party in the order. Moreover, the log entry of that conversation describes the parties thereto as "in-male", "out-male" and the subsequent transcription of the conversation denotes that "in-party" as "Beansy". The clear inference, therefore, is that the conversation only became pertinent upon subsequent review; the identity of the "in-party" as Beansy likewise became apparent on subsequent review and at no time was there an impression, opinion or belief that the in party was Joseph Della Valle.

We submit, therefore, that an intentional misrepresentation was made by Detective Eaton; that his good faith was put in issue by the Government, and, therefore, the Court should have permitted the examination of Eaton regarding the veracity of his affidavit.

Since "initial showing of some potential infirmities", United States v. Halsey, 257 F. Supp. 1002, 1005 (D.C.N.Y. 1967), "or other improprieties", United States v. Dunnings, 425 F. 2d 836, 840 (2nd Cir., 1969) was made in the Court below and the case should, therefore, be remanded for a hearing.

III

THE INTRODUCTION INTO EVIDENCE OF THE UNAUTHORIZED WARRANTLESS INTERCEPTION OF CONVERSATIONS OF DEFENDANTS GUARINO, CAPRA AND DELLA CAVA MANDATES REVERSAL OF THE JUDGMENT OF CONVICTION

Defendant, Guarino, hereby joins in and adopts the argument of defendant, Capra, as it applies to Guarino that the entire case of the Government against Guarino is tainted by the primary illegality as a result of the unauthorized seizure of conversations from December 8, 1971 through February 2, 1972.

Defendant,Guarino, hereby joins in and adopts the argument of defendant, Della Cava, relating to the warrantless seizure of conversations during the period December 8, 1971 through February 2, 1972.* Some additional comments are, however, relevant to the issues raised therein. Assistant District Attorney Fishman testified that on December 20, 1971, he received transcripts of conversations of Della Cava intercepted between that day and December 9, 1971 (753). In his opinion and in the opinion of Detective Eaton, they were narcotic related conversations (754-755). He was aware that a John Doe warrant could be obtained (804). He went to his superior, Mr. Kaufman, on December 23, 1971, asked if he had enough for an amendment and Kaufman said "yes" (859). At the time he was a "complete rooky" (879) and one of the reasons that he didn't listen to the tapes in connection with supervising the monitoring officers was

* The Court below ruled Guarino had standing to suppress the conversations intercepted between December 8, 1971 and January 6, 1972 on the basis of an affidavit sworn to by Della Cava, Capra and Guarino demonstrating that each of them had a proprietary interest in the bar. (513-514).

that he relied on their expertise (881-882). He, therefore, told Eaton to continue listening to Della Cava.

> "I was perfectly willing, and I feel I could and I still feel I can, to defer to their experience and expertise and knowledge." (emphasis added) (879).

The decision whether Della Cava's conversations were narcotic related and within the scope of the eavesdropping warrant was left completely to the discretion of the officers executing the warrant. Their opinion controlled and Fishman deferred to it.

> "The law in this area is quite clear. Both the Fourth Amendment and Rule 41(c), F.R. Crim. P. specifically state that any search warrant identify what is to be searched for and seized." United States v. Dzialak, 441 F. 2d 212, 216 (2nd Cir., 1971).

The eavesdropping order was clear and unequivocal. It

> "ORDERED ... the District Attorney ... to intercept and record telephonic conversations of JOSEPH DELLA VALLE over the above described telephones pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs ....."

The conversations of STEPHEN DELLA CAVA with persons other than Joseph Della Valle were not to be seized. Nor was the phone to be searched for any conversations of anyone but Joseph Della Valle. Yet, without an amendment, Fishman said to Eaton keep listening to Stephen Della Cava - your opinion that he is conducting narcotic related conversations is good enough for me.

> "Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), makes it clear that nothing is to be left to the discretion of the officer executing the warrant - that if something is not described in the warrant, it cannot be seized." United States v. Dzialak, supra.

From December 19, 1971 to January 6, 1972, the officers knew that "Beans" or Steve was not Joseph Della Valle and they embarked upon their general search in order to find out more about him and what his conversations were about; spending far more time listening to "Beans" than they spent listening to Joseph Della Valle.

> "As we said when dealing with a similar situation in LaVallee, the police had ample time and opportunity to seek another warrant for the additional items seized. They simply did not do so. While at one level it may be somewhat formalistic to demand they do secure such an additional warrant, the dangers inherent in a contrary rule are much too great. We are given at least a glimpse of such possible dangers by the facts of this very case. In executing what was a very precise warrant, the police spent more than four hours ransacking appellant's house for any possible incriminating evidence. Of the items seized, those which were not described in the warrant far outnumbered those described. The rule we reaffirm today not only avoids such an abhorrent general search but encourages greater care in obtaining the magistrate's approval for a specific search." Id. at 217

Even the dissent of Judge Hays in Dzialak would seemingly strike down the instant search.

> "When a valid warrant in good faith describes certain items to be seized and in the course of searching for those items, other articles are observed ... there is no requirement that a new search warrant be obtained in order to seize those other articles." Id. at 219

The article not described in the warrant must be observed (overheard) in the

course of searching for the described items. No such claim can be made herein as to conversations occurring after December 19, 1971. And, as has been argued supra at p. 54 , no such argument can be made with respect to the conversations such as the one seized on December 11, 1971 at 19:16 hours for that conversation as well as others * were seized after being marked non-pertinent and after being subsequently reviewed. The inescapable conclusion is that the monitoring officers were conducting a general search.

Accordingly, since the conversations intercepted between December 6, 1971 and January 6, 1972 and introduced at the trial were unauthorized and, since conversations intercepted between January 6, 1972 and February 2, 1972 were intercepted pursuant to an eavesdropping order based on illegally intercepted conversations, their introduction at the trial was error and the conviction should be reversed.

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* Reference to the logs of the interceptions from December 8, 1971 to January 6, 1972 reveals that both of the two conversations of DellaCava which were intercepted prior to December 19, 1971 and which were used to support the second eavesdropping order on the bar phone were marked non-pertinent and were only considered pertinent after subsequent review. The remaining conversations in that application occurred after December 19, 1971.

IV

THE AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR AN EAVESDROPPING ORDER DATED JANUARY 6, 1972 IS INSUFFICIENT ON ITS FACE. CONVERSATIONS INTRODUCED INTO EVIDENCE PURSUANT TO THAT ORDER WERE ILLEGALLY INTERCEPTED AND THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

An order dated January 6, 1972 was issued upon the affidavit of Detective George Eaton whereby conversations of the defendants, Guarino, Capra and Della Cava were intercepted and introduced at trial. That affidavit of George Eaton is totally dependent upon his opinion that conversations of defendant, Della Cava, previously intercepted over the bar phone from December 9, 1971 to January 6, 1972, are narcotic related. It is submitted that the opinions do not

> "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968).

Detective Eaton opines that in view of a heroin scarcity which is said to exist "many of the conversations which have been detailed above are properly interpreted as an indication that ... the participants to the conversations have been unable to locate a source of heroin ...." (Eaton affidavit, dated January 6, 1972, p. 16).

THE CONVERSATIONS

December 11, 1971 - answering "not so good pal" to "How are you feeling" means one party doesn't have any drugs. "Well I think we gotta wait til Monday" naturally means, if you accept the first opinion, the drugs will be there Monday."

December 13, 1971 - Since the person who answers the phone says he's sick, that also means no drugs; and since the caller is also sick he has no drugs either.

December 15, 1971 - Eaton opines that since the caller didn't "feel good last night" the metaphor continues. The caller has no heroin. Significantly, none of the callers are identified at the time the affidavit is submitted nor are any of the conversations, except for Eaton's opinion, seemingly narcotic related.

The next conversation, December 20, 1971, now assumes, from the opinion rendered as to the first three, a narcotic relation because the caller asks whether "Sleepy ordered the plants for the old man?" The heroin is suddenly available according to Eaton and "plants" is the code word. No identification of the caller is made except that his name is Fred.

December 21, 1971 - Heroin is now referred to as "the Christmas party". No matter that the conversation takes place four days before Christmas. Again, the caller is not identified.

December 21, 1971 - Because Della Cava has told one person the "Christmas Party" is off when he tells this caller that its on, it means he only has enough heroin for one of them. Absolutely no question in the mind of the magistrate can be raised that perhaps - as people do - a selection is made as to who is invited to a party around Christmas time, December 21, 1971.

December 23, 1971 - A request for a Christmas present turns to a request for heroin. So far, code names for heroin have been, "How are you feeling", "sick", "didn't feel good", "plants", "Christmas party", and "presents". Eaton follows Della Cava and he drives fast to the Bronx where he, in fact,picks up a package or "present" and goes back to the bar. Eaton interprets fast driving with an effort to "shake a tail." No statement is made whether Eaton was seen following or even that Della Cava looked at him. No observations are made as to what is going on in the bar the night before Christmas Eve. If there had been, Eaton may have observed a party.

All of the above interpretations of objectively innocuous behavior are based on one statement which might be taken as fact - there was a heroin shortage. Can it be honestly said that the magistrate, after reading the averments in the affidavit, could have exercised his own judgment on the basis of facts.

The mere conclusion of the officer cannot be a basis for probable cause.

Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Ventresca, 380 U.S. 102 (1965);

> "(I)t is of critical importance that the judge or commissioner be provided with sufficient information to enable him to make a considered judicial determination as to whether the warrant should be issued. The proper performance of this function requires an affidavit which presents facts ... (emphasis added) (and) 'the court must still insist that the magistrate perform his 'neutral and detached' function and not merely serve as a rubber stamp for the police.' " (citing Aguilar, supra). United States v. Freeman, supra at 462.

One other fact does exist which must be mentioned. Joseph Della Valle has been heard by Eaton twice in conversations about drugs. The connection between Della Valle and Della Cava is, therefore, made in the following manner:

1. Della Valle asks how long the bar will be open on December 19, 1971

2. On December 23, 1971, Della Valle waives "to someone" inside the bar; he then drives away; two minutes later, Della Cava comes out of the bar.

The first "connection" is too innocuous to comment upon. The second is significant insofar as it establishes that Della Valle waived goodbye to someone unknown and unidentified and, thereafter, drove away. Is Della Cava's exit two minutes later a fact which supports an inference that he is dealing in drugs with Della Valle?

This Court must, of necessity, conclude that the eavesdropping order

of January 6, 1972 relies totally on opinion, without substantiation in objective facts which can be measured alone. The magistrate did not look at facts in Eaton's affidavit. He was presented only with the opinion of the police officer and for that reason, the order is invalid on its face.

V

THE COMPENDIUM OF PREJUDICIAL PROSECUTORIAL ACTS DURING THE TRIAL TAKEN TOGETHER WITH THE DISSEMINATION OF PUBLICITY DENIED THE DEFENDANTS A FAIR TRIAL

Defendant Guarino hereby joins in defendant Capra's point relative to the governmental action resulting in "massive and lurid publicity." Six instances of prosecutorial action at the trial considered together with the pre-trial publicity and publicity during and after the trial compel the exercise of this Court's supervisory power over the prosecution of indictments and a reversal and dismissal of the indictment. Marshall v. United States, 360 U.S. 310 (1959). Cf. Rideau v. Louisiana, 373 U.S. 723 (1963) and Napue v. Illinois, 360 U.S. 264 (1959).

The first instance occurred during the direct examination of the main Government witness, Joaquin Ramos. After the prosecutor established that Ramos had been in jail from 1957 to 1969, he elicited from Ramos that he had known the defendant Guarino since 1959. (141, 144). Defendant's motion for a mistrial was denied. (195). The jury was, therefore, left with the incurable inference that Guarino had been in jail.

Secondly, when one of the Government chemists was asked about the validity of a particular test for heroin, he volunteered that it was the same test used in the film "The French Connection". Motions for mistrial were denied and the Court instructed the jury to disregard the remark. (243).

On cross-examination of defense witness Herbert Sperling, the

prosecutor asked whether Sperling had been indicted with Joseph Valachi and others in 1959. Motions for mistrial were made and denied and counsel further objected that the Court's instructions to disregard the names were insufficient to cure the prejudice. (3331-35, 3364).

In connection with two important factual issues before the jury - whether Ramos was the person who delivered the suitcase to the Toledo Railroad Terminal and whether Exhibit 21 was written by defendant Capra - the prosecutor overstepped the bounds of zealous advocacy. Melton Julert had consistently identified Ramos as the person who had handed him the suitcase in Toledo. (1726-32). The Government recalled him to the stand, however, to ask whether he had not recently identified John Capra in a photograph as the man who had delivered the suitcase to Toledo. The Court precluded the Government from asking the question but the prosecutor went ahead and asked Julert "have you had a recent experience in which you have misidentified - - -". An immediate objection was sustained and a motion for mistrial was denied. (2947-58). Ruthella Roudebush who had also identified Ramos as the man whom she had driven from the Toledo Railroad terminal to the Toledo airport on the day the suitcase was delivered was asked by the prosecutor whether she had misidentified Ramos in a picture which the prosecutor had recently shown her. It was left to defense counsel to elicit that the prosecutor had shown her other photographs in which she had identified Ramos as the man. (2344-56). Finally, while the jury was deliberating and after they had requested exhibits, the prosecutor was observed by defense

counsel waving Exhibit 21 (the note allegedly written by Capra) and the foreman of the jury volunteered that they wanted "that piece of paper". (4033-34, 4038-41). Thus, the jury was directed to what the prosecutor wanted them to have for deliberation.

We submit that the prosecutor injected into the jury's minds that defendant Guarino was convicted of a crime and that the case they were to decide was in the category of the "French Connection" and Joseph Valachi. Furthermore, the prosecutor attempted in a non-testimonial way to support its contention that Ramos did not deliver the suitcase to Toledo and deliberately influenced the jury's request for exhibits as if he had entered the jury room and suggested they look at Exhibit 21.

The greater the showing of prosecutorial misconduct, the less need for a showing of materiality. This is so becuase "(t)he Administration of justice must not only be above reproach it must be beyond the suspicion of reproach". Kyle v. United States, 297 F. 2d 507 (C.A.2). Furthermore, "(t)he court must combat this threat to its own dignity and to the dignity of the criminal system or risk the possibility that the community will lose faith in the entire criminal process." Note: The Prosecutors Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 138 (1964).

The pre-trial publicity, the trial publicity and the prosecutor's actions detailed above dealt with the issue of guilty. Cf. United States v. Persico, 425 F. 2d 1375, 1380 (2nd Cir.,), cert. den. 400 U.S. 869 (1970); United States ex rel Gallo v. New York State Department of Correctional Services, 335 F. Supp. 915 (S.D.N.Y. 1972).

Accordingly, the judgment herein should be reversed and the indictment dismissed.

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, DEFENDANT GUARINO ADOPTS BY REFERENCE THOSE ARGUMENTS RAISED IN THE BRIEFS OF DEFENDANTS CAPRA, DELLA CAVA, JERMAIN, HARRIS AND MORRIS WHICH ARE APPLICABLE TO HIM

Respectfully submitted,

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(212) 267-4488

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of March ; 19 74 at No. FOLEY SQUARE deponent served the within BRIEF upon U.S. ATTORNEY the APPELLEE herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the atty. for appellee therein.

Sworn to before me,
this 20 day of March 19 74

Edward Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975